

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of Applications of	)	
	)	
KANNEW BROADCAST TECHNOLOGIES	)	
	)	
For Renewal of License of Multichannel	)	
Multipoint Distribution Service Station WMI878,	)	File No. BRMD-20010329AGH
Augusta, Maine	)	
	)	
For Major Modification	)	
Of Multichannel Multipoint Distribution Service	)	File No. 50826-CM-P-97
Station WMI878, Augusta, Maine	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 2003

Released: November 13, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a Petition to Deny filed by Pegasus Communications Portfolio Holdings, Inc. (“Pegasus”) regarding Multichannel Multipoint Distribution Service (MMDS) Station WMI878, Augusta, Maine, licensed to Kannew Broadcast Technologies (“Kannew”).<sup>1</sup> For the reasons stated below, we grant the Pegasus Petition. We also dismiss as moot a request for waiver of Section 21.303(d) of the Commission’s Rules filed by Kannew on August 14, 1997, as well as the captioned applications filed by Kannew.<sup>2</sup>

II. BACKGROUND

2. On April 14, 1993, the Commission granted a conditional license to Kannew for MMDS Station WMI878, Augusta, Maine. According to the terms of the license, Kannew was required to complete construction of the station on or before April 14, 1994.<sup>3</sup> Kannew filed a certification of

<sup>1</sup> Petition to Deny Application for Renewal (filed Aug. 2, 2001) (Petition).

<sup>2</sup> Letter from Todd D. Gray, Esq. to William F. Caton, Acting Secretary, Federal Communications Commission (filed Aug. 14, 1997) (Waiver Request).

<sup>3</sup> See Conditional License for Station WMI878, File No. BPMD-8306155 (granted Apr. 14, 1993).

construction on April 21, 1994.<sup>4</sup> On October 18, 1995, the Commission issued to Kannew a license for Station WMI878 with an expiration date of May 1, 2001.<sup>5</sup>

3. In March 1994, Kannew entered into a lease agreement with Micro-Lite Television (Micro-Lite).<sup>6</sup> Kannew states that Micro-Lite “apparently did not commence commercial service to its customers.”<sup>7</sup> On August 14, 1996, Kannew terminated its agreement with Micro-Lite because Micro-Lite had not fulfilled its obligations under the contract.<sup>8</sup> Kannew states that on September 3, 1996, it informed Pegasus, the MMDS authorization holder for the Waterville-Augusta, Maine, Basic Trading Area (BTA), of the availability of the station for lease or sale.<sup>9</sup> One year later, on August 14, 1997, Kannew filed a major modification application seeking to change the location of the Station and simultaneously filed a request for waiver of the Commission’s rules to permit the Station to be off the air until such time as the Commission granted the pending major modification application.<sup>10</sup> Kannew represented that the station would be used within sixty days of the grant of its major modification application.<sup>11</sup> The waiver request remains pending.

4. On March 29, 2001, Kannew filed an application to renew the license for Station WMI878.<sup>12</sup> That application was accepted for filing on July 3, 2001.<sup>13</sup> Pegasus filed its petition to deny on August 2, 2001.<sup>14</sup>

### III. DISCUSSION

5. Pegasus argues that although Kannew certified that its station had been constructed, there is no indication on the record before us that Station WMI878 has ever been operated.<sup>15</sup> Pegasus also argues that the Commission should not grant a renewal application for a station that is not currently constructed.<sup>16</sup> Pegasus also alleges that Kannew is “warehousing” spectrum<sup>17</sup> and in violation of the

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<sup>4</sup> Letter from Todd D. Gray, counsel to Kannew Broadcast Technologies, to William F. Caton, Acting Secretary, Federal Communications Commission, Aug. 14, 1997, at 1.

<sup>5</sup> License for Station WMI878, File No. BLMD-9450475, granted Oct. 18, 1995. Pegasus states that the Commission forfeited the license after Kannew filed its certification of construction but that the Commission later removed the forfeiture when it granted the license to Kannew for Station WMI878 on October 18, 1995. The Commission’s staff has been unable to locate a forfeiture notice in its files.

<sup>6</sup> Petition at 2, *citing* letter from Todd Gray, counsel for Kannew, to William Caton dated Aug. 14, 1997.

<sup>7</sup> Waiver Request at 2.

<sup>8</sup> Motion to Dismiss and Opposition to Petition to Deny filed by Kannew on Dec. 17, 2002, at 2.

<sup>9</sup> Waiver Request at 2.

<sup>10</sup> *See id.* at 2-3.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> File No. BRMD-20010329AGH.

<sup>13</sup> Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Accepted for Filing, Report No. 424, *Public Notice* (rel. Jul. 3, 2001) at 53.

<sup>14</sup> Petition. Kannew filed a Motion to Dismiss and Opposition to Petition to Deny on August 15, 2001. Motion to Dismiss and Opposition to Petition to Deny (filed Aug. 15, 2001) (Opposition). Kannew filed a reply on August 23, 2001. Reply to Opposition to Petition to Deny (filed Aug. 23, 2001) (Reply).

<sup>15</sup> Petition at 2-3.

<sup>16</sup> Petition at 3-4.

Commission's Rules by failing to give timely notice of discontinuance of service.<sup>18</sup> Kannew asks the Commission to dismiss the Petition because Pegasus allegedly lacks standing to file a petition to deny.<sup>19</sup> Kannew argues that a grant of its major modification application would be in the public interest because it has made a "firm commitment" to build the station once the modification application is granted.<sup>20</sup>

6. Initially, we conclude that Pegasus has standing to file a petition to deny. Section 309(d)(1) of the Communications Act, as amended, permits any "party in interest" to file a petition to deny any application.<sup>21</sup> To establish standing, a petitioner must show "(1) a distinct and palpable personal injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested."<sup>22</sup> In this case, we conclude that Pegasus has standing because if Kannew's license were renewed, it would be deprived of the opportunity to file an application to use Kannew's channels. If an incumbent MMDS license is forfeited, the BTA authorization holder has the exclusive right to apply for an authorization to operate a station within the area formerly served by the incumbent.<sup>23</sup> Pegasus' right to apply for Kannew's channels in case of forfeiture gives it a palpable interest in the status of Kannew's license.

7. We conclude that Kannew's license forfeited as of May 21, 1995 because Station WMI878 never provided service to the public. The express language of Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . ."<sup>24</sup> The three options are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver pursuant to Section 21.303(d)(3).<sup>25</sup> Significantly, prior to the adoption of Section 21.303(d), the Commission's Rules did not require licensees to relinquish unused frequencies.<sup>26</sup> The Commission found that, "[i]n addition to preventing others from using the spectrum, this results in the Commission being unable to discern when spectrum is not being used or is being underutilized."<sup>27</sup> Therefore, the Commission adopted Section 21.303(d) to promote the efficient use of the spectrum by requiring licensees to submit licenses covering unused spectrum to the Commission for cancellation.<sup>28</sup>

8. In the Waiver Request, Kannew argues that it rendered service by leasing the station's capacity to MicroLite.<sup>29</sup> Contrary to that argument, a licensee that enters into a channel lease agreement

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<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> *Id.*

<sup>19</sup> Opposition at 3-5.

<sup>20</sup> *Id.* at 5-6.

<sup>21</sup> 47 U.S.C. § 309(d)(1).

<sup>22</sup> See Weblink Wireless, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 24642, 2464\_ ¶ 11 (WTB 2002).

<sup>23</sup> 47 C.F.R. § 21.932(c).

<sup>24</sup> 47 C.F.R. § 21.303(d).

<sup>25</sup> See 47 C.F.R. § 21.303(d)(1)-(3).

<sup>26</sup> See Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987) (*Part 21 R&O*).

<sup>27</sup> *Id.*

<sup>28</sup> See *id.*

<sup>29</sup> Waiver Request at 2.

assumes the risk of license cancellation if the third party fails or ceases to provide service.<sup>30</sup> We note that Kannew had twelve months to work out alternative arrangements and/or ensure that the station's facilities were used to provide service. In accordance with Section 21.303(d), Kannew had regulatory options available to it if it desired to retain the station license - for example, timely request a waiver pursuant to Section 21.303(d)(3).<sup>31</sup> In fact, based on the record before us, it appears that Station WMI878 has never been used to provide service. We therefore find that the license for Station WMI878 was forfeited on May 21, 1995, or one year and thirty days after Kannew certified that it had completed construction of Station WMI878.<sup>32</sup> This result is consistent with the plain language of Section 21.303(d) and case precedent.<sup>33</sup>

9. Since Kannew forfeited the license for Station WMI878 on May 21, 1995, we will dismiss its August 14, 1997 Waiver Request as moot. We will also dismiss as moot the applications to modify and renew the license for Station WMI878.

#### IV. ORDERING CLAUSES

10. Accordingly IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303, that the license for Station WMI878 IS DEEMED CANCELED as of May 21, 1995.

11. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 309, and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, that the Petition to Deny filed by Pegasus Communications Portfolio Holdings, Inc. on August 2, 2001 IS GRANTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303, that the waiver request filed by Kannew Broadcast Technologies on August 14, 1997 IS DISMISSED AS MOOT.

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<sup>30</sup> See, e.g., Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, 12 FCC Rcd 16802, 16904-16905 ¶¶ 188-189 (1997).

<sup>31</sup> See 47 C.F.R. § 21.303(d)(1), (3). Modification of the license to delete *only* the unused frequencies was not an option in this matter. *Cf.* 47 C.F.R. § 21.303(d)(2).

<sup>32</sup> Under 47 C.F.R. § 21.303(d), a licensee has thirty days after the end of the twelve months of nonuse to take one of the actions listed in that rule. Accordingly, we conclude that Kannew forfeited the license at the end of that thirty-day period.

<sup>33</sup> See San Diego MDS Company, *Order on Reconsideration*, DA 03-XXXX (WTB PSPWD rel. Sep. XX, 2003); Hydra Communications, *Order on Reconsideration*, 18 FCC Rcd 4481 (WTB PSPWD 2003)

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 21.28 of the Commission's Rules, 47 C.F.R. § 21.28, that the application for modification of license filed by Kannew Broadcast Technologies on August 14, 1997 (File No. 50826-CM-P-97) and the application for renewal filed by Kannew Broadcast Technologies on March 29, 2001 (File No. 20010329AGH) ARE DISMISSED.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
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